91-680

No. (2)

Supreme Court, U.S.
FILED
OCT 22 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

FAIRWAY SPRING CO., INC.; THEODORE PATERSON, as President and Director of Fairway Spring Co., Inc.; DONALD R. PETERSON, as Vice President and Director of Fairway Spring Co., Inc.; DOROTHY TARBY, as Secretary-Treasurer and Director of Fairway Spring Co., Inc.; and LYNN G. KEYSER,

Petitioners,

vs.

SOVRAN BANK/MARYLAND,

Respondent.

CHEMUNG CANAL TRUST COMPANY, as Trustee of the Fairway Spring Company, Inc. Restated Pension Plan,

Petitioner,

vs.

SOVRAN BANK/MARYLAND,

Respondent.

APPENDIX TO PETITIONS

Kenneth A. Payment, Esq.,
Counsel of Record for Fairway Petitioners
A. Paul Britton, Esq.
Robert F. Pizzo, Esq.
HARTER, SECREST & EMERY
700 Midtown Tower
Rochester, New York 14604
(716) 232-6500

Edward B. Hoffman
Counsel of Record
Donna L. Mitchell
Sayles, Evans, Brayton, Palmer & Tifft
Attorneys for Petitioner Chemung
One West Church Street
Elmira, New York 14901
Telephone: (607) 734-2271

Daily Record Corporation
Rochester, New York

(17760)

TABLE OF CONTENTS

	Page
Relevant Statutory Provisions	A-1
Decision and Order of Hon. Michael A. Telesca, U.S.D.J.	A-15
Amendment to Decision and Order by Hon. Michael A. Telesca, U.S.D.J.	A-24
Decision of United States Court of Appeals for the Second Circuit	A-27
Brief of Secretary of Labor in *Call v. Sumitomo Bank of California*	A-42

ERISA § 2, 29 U.S.C. § 1001

Findings and declaration of policy

(a) The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore de-

sirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) It is hereby declared to be the policy of this Act to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) It is hereby further declared to be the policy of this Act to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

ERISA § 404, 29 U.S.C. § 1104

Fiduciary duties

(a)(1) Subject to sections 403(c) and (d) [29 USC § 1103(c) and (d)], 4042 [29 USC § 1342], and 4044 [29 USC § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or title IV.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3) [29 USC § 1107(d)(3)]), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5) [29 USC § 1107(d)(4) and (5)]).

(b) Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over assets in his account, if a participant or beneficiary exer-

cises control over the assets in his account (as determined under regulations of the Secretary)-

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

ERISA § 405, 29 U.S.C. § 1105

Liability for breach by co-fiduciary

(a) In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 404(a)(1) [29 USC § 1104(a)(1)] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

(b)(1) Except as otherwise provided in subsection (d) and in section 403(a)(1) and (2) [29 USC § 1103(a)(1) and (2)], if the assets of a plan are held by two or more trustees-

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 403(a)(1) [29 USC § 1103(a)(1)].

(c)(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary re-

sponsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that-

(A) the named fiduciary violated section 404(a)(1) [29 USC § 1104(a)(1)]

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a).

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 402(c)(3) [29 USC § 1102(c)(3)].

(d)(1) If an investment manager or managers have been appointed under section 402(c)(3) [29 USC § 1102(c)(3)], then, notwithstanding subsections (a) (2) and (3) and subsection (b), no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

ERISA § 409, 29 U.S.C. § 1109

Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act [29 USC § 1111].

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

ERISA § 502, 29 U.S.C. § 1132

Civil enforcement

(a) A civil action may be brought-

(1) by a participant or beneficiary-

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 USC § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 USC § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title; or

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (1).

(b)(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1986 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of, or the enforcement of, parts 2 and 3 of the subtitle [29 USC §§ 1051 et seq., §§ 1081 et seq.] (relating to participation, vesting, and funding), only if —

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation

affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515 [29 USC § 1145].

(c)(1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 606 [29 USC § 1166(1) or (4)] with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

(2) The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 101(b)(4) [29 USC § 1021(b)(4)]. For purposes of this paragraph, an annual report that has been rejected under section 104(a)(4) [29 USC § 1024(a)(4)] for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 101(d) [29 USC § 1021(d)] with respect to any participant or beneficiary may in the court's discretion be liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(d)(1) An employee benefit plan may sue or be sued under this title as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this title against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this title.

(e)(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this title brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this title is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citizen-

ship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g)(1) In any action under this title (other than an action described in paragraph 2) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this title by a fiduciary for or on behalf of a plan to enforce section 515 [29 USC § 1145] in which a judgment in favor of the plan is awarded, the court shall award the plan-

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of-

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate. For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of the Internal Revenue Code of 1986 [26 USC § 6621].

(h) A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under sub-

section (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle [29 USC § 1101 et seq.]. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) In the case of a transaction prohibited by section 406 [29 USC § 1106] by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of the Internal Revenue Code of 1986 [26 USC § 4975(f)(5)]) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of such Code [26 USC § 4975(f)(4)]) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code [26 USC § 4975(e)(1)].

(j) In all civil actions under this title, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of title 28, United States Code [28 USC § 518(a)]), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action con-

trary to the provisions of this Act, or to compel him to take action required under this title, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

(1)(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 [29 USC §§ 1101 et seq.] by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person, the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of the Internal Revenue Code of 1986 [26 USC § 4975].

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHEMUNG CANAL TRUST COMPANY, As Trustee of the FAIRWAY SPRING COMPANY, INC. RESTATED PENSION PLAN, WILLIAM H. BROWN and JOSEPH R. PETERS,

Plaintiffs,

v.

SOVRAN BANK/MARYLAND,

Defendant and Third-Party Plaintiff,

v.

FAIRWAY SPRING CO., INC., THEODORE PETERSON, As President and Director of FAIRWAY SPRING CO., INC., DONALD R. PETERSON, As Vice-President and Director of FAIRWAY SPRING CO., INC., DOROTHY TARY, As Secretary-Treasurer of FAIRWAY SPRING CO., INC., and JOHN DOE and JANE DOE, As Members of the INVESTMENT COMMITTEE OF THE FAIRWAY SPRING COMPANY, INC. RESTATED RETIREMENT INCOME PLAN, and LYNN KEYSER,

Third-Party Defendants.

CIV-90-0013T
DECISION
AND ORDER

INTRODUCTION

The Chemung Canal Trust Company (Chemung), as the present trustee of the Fairway Spring Company, Inc. Restated Pension Plan (the Plan), and two beneficiaries of the Plan brought this action against Sovran Bank/Maryland (Sovran) pursuant to the Employee Retirement Income Security Act (ERISA). Plaintiffs allege that Sovran, which was trustee of the Plan immediately prior to Chemung, breached its fiduciary duties by failing to exercise prudence and due diligence in discovering and rectifying the wrongful acts of Glenn Dawson, who had been trustee of the Plan before Sovran. Plaintiffs further allege that Sovran itself made two "disastrous" investments which also constituted a breach of its fiduciary duty.

Sovran then filed a third-party complaint against Fairway Spring Co. (Fairway), the employer who established the Plan, for indemnity and/or contribution, alleging that Fairway is a fiduciary of the Plan, and as a result of its own breach of its duty with regard to the activities of Dawson, it must either indemnify Sovran or contribute to satisfaction of the judgment should Sovran be found liable. Sovran also filed a counterclaim against Chemung Canal Trust, alleging that it failed to evaluate adequately and pursue claims of the Plan and this failure contributed to the losses which are the subject of its present suit against Sovran. It requests relief on behalf of the Plan, as well as contribution and or indemnity should it be found liable.

Fairway, the third party defendant, now moves to dismiss Sovran's third party complaint for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6) on the grounds that ERISA does not permit a fiduciary to sue a co-fiduciary for indemnification or contribution. Chemung moves to dismiss Sovran's counterclaim for indemnification or contribution for essentially the same reasons — that ERISA does not allow fiduciaries to seek contribution or

indemnity. In addition, Chemung moves to dismiss Sovran's counterclaim on behalf of the Plan because Sovran is no longer a trustee and thus does not have standing to sue. For the reasons discussed below, the motions of Chemung and Fairway are granted and accordingly, Sovran's counterclaims and third-party complaint are dismissed.

DISCUSSION

A. *SOVRAN'S STANDING TO SUE ON BEHALF OF THE PLAN:*

The defendant Sovran brings a counterclaim against Chemung on behalf of the Plan, alleging that Chemung breached its fiduciary duty by failing adequately to evaluate and pursue claims of the Plan. Sovran claims that, as a former fiduciary, it has a continuing obligation to address and attempt to remedy breaches on behalf of the Plan. After carefully reviewing the relevant authority, I find that Sovran is without standing to bring such a claim.

Section 409 of ERISA contemplates actions by four classes of plaintiffs: the Secretary of Labor, beneficiaries, participants, and fiduciaries. 29 U.S.C. § 1132. Because Sovran is no longer a fiduciary, it has no standing to sue Chemung on behalf of the Plan. *Blackmar v. Lichtenstein*, 603 F.2d 1306, 1310 (8th Cir. 1979); *see also Molnar v. Wibbelt*, 789 F.2d 244, 250 (3d Cir. 1986).

In *Blackmar,* the settlor of a plan governed by ERISA removed the plan's then trustee and appointed a new trustee in accordance with the provisions of the plan. 603 F.2d at 1308. The former trustee, Charles Blackmar, challenged the settlor's actions, alleging that the settlor breached its fiduciary duty by removing him in order to preclude him from filing a suit against it. *Id.* at 1309. The court held that it could not "deem Blackmar a fiduciary, though he once was, and allow him to bring suit in a fiduciary

capacity" when he had been removed in a manner consistent with the trust document itself. *Id.; see also Blassie v. Kroger Co.*, 345 F.2d 58, 67 (8th Cir. 1965) ("a fiduciary, after his removal or resignation, does not have sufficient official interest to authorize him to seek appellate relief of an adverse judgment...."). The court concluded that, "[i]n short, *Blackmar* no longer has an interest in this suit." *Blackmar*, 603 F.2d at 1309.

This case presents a situation analogous to that in *Blackmar*. Chemung replaced Sovran as trustee of the Plan, but did not obtain fiduciary status until after Sovran was terminated. Sovran now essentially challenges Chemung's failure to include Fairway in an action against Sovran for breach of its fiduciary duties. ERISA, however, provides adequate protection to plans and their participants, in that either they or the Secretary of Labor have standing to bring suit if Chemung breaches any of its fiduciary duties. *See Blackmar*, 603 F. 2d at 1310. Accordingly, because Sovran is a stranger to the Plan in so far as any alleged breach by Chemung, it has no standing to assert a counterclaim on behalf of the Plan.

B. *SOVRAN'S CLAIMS FOR CONTRIBUTION AND INDEMNITY:*

Sovran's remaining claims against plaintiff Chemung and third-party defendant Fairway are for contribution and/or indemnity. Essentially, Sovran argues that if it is found to have breached its fiduciary duties, that it should be able to recover all or part of the judgment from Chemung and Fairway, which it claims are also liable.

In order to find a cause of action for indemnity and/or contribution, the court must determine either that Congress expressly provided for it or Congress' intent to allow it is clearly implied in

the statute, or that the cause of action has become part of federal common law. *Texas Industries, Inc. v. Radcliffe Materials, Inc.*, 451 U.S. 630, 638 (1981) (holding that no cause of action for contribution and/or indemnity exists under Federal Anti-trust law).

Although the Second Circuit has indicated that a fiduciary *may* be able to seek indemnification from a co-fiduciary under ERISA, it has neither considered nor decided this issue. *See Dardaganis v. Grace Capital, Inc.*, 889 F.2d 1237, 1241 (2d Cir. 1989). It is uncontroverted that ERISA does not explicitly provide for fiduciary contribution or indemnity. The parties differ, however, on whether the statute implies a cause of action and whether one exists or should be created as part of the federal common law.

Where it is alleged that a statute implies a right of action, the Court must focus on Congressional intent through examination of the legislative history and other factors such as "the identity of the class for whose benefit the statute was enacted, the overall legislative scheme, and the traditional role of the states in providing relief." *Texas Industries*, 451 U.S. at 639.

In enacting ERISA, Congress repeatedly expressed its intent that the statute "establish judicially enforceable standards to insure honest, faithful, and competent management of pension and welfare funds," and "reduce substantially the potentialities for abuse" by fiduciaries. *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 137, 140 n.8 (1985) (remarks of Sen. Bentsen, Sen. Nelson, reprinted in 3 Leg. Hist. 4795, 4803; 120 Cong. Rec. 29954, 29957 (1974)). Nowhere, however, does the legislative history suggest that Congress intended that a fiduciary be allowed to seek contribution or indemnity for a breach of its fiduciary responsibilities.

In fact, Congress has carefully set forth those acts or omissions for which a fiduciary *is* personally liable. *Narda, Inc. v. Rhode Island Hospital Trust National Bank*, 744 F. Supp. 685,

696-97 (D. Md. 1990). For example, a fiduciary is liable for a co-fiduciary's breach *only*

> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> (2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

29 U.S.C. § 1105(a). As section 1105(a) demonstrates, Congress carefully and narrowly defined the circumstances under which a fiduciary could be held personally liable for a co-fiduciary's breach. *See* 29 U.S.C. § 1105(a)(3); *Narda*, 744 F. Supp. at 696. Given Congress' attempts to "precisely tailor fiduciary liability to fit particular breaches, . . . [i]t is not surprising that rights of indemnification and contribution among culpable fiduciaries are not provided." *Narda*, 744 F. Supp. at 696. Thus, the intent to allow a fiduciary to sue for contribution and/or indemnity is absent both from the express language of ERISA and from its legislative history.

Furthermore, a fiduciary is not a member of the class for whose benefit ERISA was enacted. *Id.* (Congress intended to "protect participants, beneficiaries and plans, and remedies are provided to fiduciaries only insofar as they advance that purpose"); *see also Russell*, 473 U.S. at 3090 ("A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan...."). The lack of reference to contribution or indemnity, together with

the fact that fiduciaries are not members of the class which ERISA was designed to protect, makes it clear that Congress did not intend to imply a cause of action for contribution or indemnity in their favor. *See Texas Industries*, 451 U.S. at 638-39.

> Indeed, implying a right of contribution is particularly inappropriate where, as in this case, the party seeking contribution " 'is a member of the class [e.g., fiduciaries] whose activities Congress intended to regulate for the protection and benefit of an entirely distinct class [e.g., ERISA plans],' " and where there is no indication in the legislative history "that Congress was concerned with softening the blow on joint wrongdoers."

Kim v. Fujikawa, 871 F.2d 1427, 1433 (9th Cir. 1989) (citing *Texas Industries*, 451 U.S. at 639); *Call v. Sumitomo Bank of California*, 881 F.2d 626 (9th Cir. 1989); *but see Free v. Briody*, 732 F.2d 1331, 1337 (7th Cir. 1984).

Accordingly, if Sovran is entitled to contribution or indemnity under ERISA, the source of such a right must be federal common law. *Texas Industries*, 451 U.S. at 640. The Supreme Court has indicated that federal courts should hesitate to "find" a cause of action in federal common law, and should do so only where it is "necessary to protect uniquely federal interests," or where "Congress has given the courts the power to develop substantive law." *Id.* at 640 (citations omitted). In this case, there are no interests which are uniquely federal; "contribution among [ERISA fiduciaries] does not involve the duties of the Federal Government, the distribution of powers on our federal system, or matters necessarily subject to federal control even in the absence of statutory authority." *Id.* at 642.

The courts may also fashion federal common law when Congress has empowered them to create guiding rules of law under a comprehensive statutory scheme. *Id.* In enacting a such a statute, Congress may give the courts broad power to develop substantive law consistent with the purpose of the statute. *Id.* at 643. Such a

grant does not, however, necessarily imply that Congress intended to give the courts equally broad power to formulate enforcement remedies or to fashion additional forms of relief. *Id.* at 643-44; *see Russell*, 473 U.S. at 147-48.

The Supreme Court has held that courts are empowered under ERISA to develop a substantive common law of rights and obligations under ERISA-regulated plans, consistent with trust principles. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 5. Ct. 948, 954 (1989). Nevertheless, "the federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Russell*, 473 U.S. at 145; *Franklin v. Aetna Life Ins. Co.*, 10 Emp. Ben. Cases 1022, 1026 (D.C.S.C. 1988) (adding a cause of action to ERISA in favor of fiduciaries is "not a situation where Congress has empowered the courts to develop substantive law.").

In *Russell*, the Supreme Court recognized ERISA's "carefully integrated civil enforcement provisions" and "interlocking, interrelated, and interdependent remedial scheme," and expressed its reluctance to "tamper with an enforcement scheme crafted with such evident care." 473 U.S. at 146-47. The Court noted that the courts should be wary of adding additional remedies under a statute such as ERISA, especially where Congress has provided an integrated and comprehensive remedial plan. *Id.* at 147; *See also Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 97 (1981); *Texas Industries*, 451 U.S. at 645-46. When the entire structure of ERISA is examined together with its enforcement provisions, fiduciary liability provisions and legislative history, it must be concluded that Congress did not intend the courts to create a right of contribution and indemnity in favor of fiduciaries. *See Russell*, 473 U.S. at 148.

In sum, the courts may develop substantive common law under ERISA only where it is consistent with Congressional intent. *See Russell*, 473 U.S. at 145; *Texas Industries*, 451 U.S. at 643-44.

Sovran has not demonstrated that Congress in any way intended that ERISA should benefit fiduciaries. In fact, it is clear that Congress intended to *regulate* the conduct of fiduciaries for the exclusive benefit of pension plans, participants and beneficiaries. Because it would be inconsistent with Congress' stated purposes in enacting ERISA, a right of action in favor of fiduciaries for contribution or indemnity cannot be justified under federal common law.

CONCLUSION

Having carefully considered the existing authority on the issue of whether or not a fiduciary can assert a claim for contribution or indemnity, this court finds that such a claim is not supported either by statutory interpretation of ERISA or by federal common law. Accordingly, Sovran's third party complaint against Fairway and cross-claim against Chemung for contribution and indemnity are dismissed. In addition, Sovran's cross-claim against Chemung on behalf of the Plan is dismissed because Sovran lacks standing to bring such an action.

ALL OF THE ABOVE IS SO ORDERED.

s/ MICHAEL A. TELESCA
United States District Judge

DATED: Rochester, New York
December 27, 1990

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHEMUNG CANAL TRUST COMPANY, ET AL.,

Plaintiffs

- vs -

SOVRAN BANK/MARYLAND,

Defendant and Third-Party Plaintiff

CIV-90-0013T

- vs -

FAIRWAY SPRING CO., INC., ET AL.,

Third-Party Defendants

Take notice of an Order, of which the within is a copy, duly granted in the within entitled action on the 16th day of January, 1991, and entered in the office of the Clerk of the United States District Court, Western District of New York, on the 16th day of January, 1991.

Dated: Rochester, New York
January 16, 1991

Clerk
United States District Court
Western District of New York
282 U.S. Courthouse
Rochester, New York 14614

TO: Edward B. Hoffman, Esq.
Lonie Hassel, Esq.
Kenneth A. Payment, Esq.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

CHEMUNG CANAL TRUST COMPANY, As Trustee of the FAIRWAY SPRING COMPANY, INC. RESTATED PENSION PLAN, WILLIAM H. BROWN and JOSEPH R. PETERS,

Plaintiffs,

v.

SOVRAN BANK/MARYLAND,

Defendant and Third-Party Plaintiff

v.

FAIRWAY SPRING CO., INC., THEODORE PETERSON, As President and Director of FAIRWAY SPRING CO., INC., DONALD R. PETERSON, As Vice-President and Director of FAIRWAY SPRING CO., INC., DOROTHY TARBY, As Secretary-Treasurer of FAIRWAY SPRING CO., INC., and JOHN DOE and JANE DOE As Members of the INVESTMENT COMMITTEE OF THE FAIRWAY SPRING CO., INC. RESTATED RETIREMENT INCOME PLAN, and LYNN KEYSER,

Third-Party Defendants.

CIV-90-0013T
AMENDMENT TO DECISION AND ORDER FILED DECEMBER 27, 1990

The Decision and Order entered in this case on December 27, 1990 is amended to include the following:

This decision is interlocutory in nature, and thus not ordinarily immediately appealable. It involves a "controlling question of law" which has not yet been decided in the Second Circuit, and "as to which there is a substantial ground for difference of opinion," namely, whether, under ERISA, a fiduciary may sue another fiduciary for indemnification or contribution. 28 U.S.C. § 1292(b). Immediate appeal of this issue to the Second Circuit may materially advance the ultimate termination of this litigation, and would prevent the parties from having to relitigate much of the case should the Second Circuit find after a final decision has been rendered, that ERISA does permit a fiduciary to sue for indemnification or contribution. 28 U.S.C. § 1292(b).

ALL OF THE ABOVE IS SO ORDERED.

s/ MICHAEL A. TELESCA

United States District Judge

DATED: Rochester, New York
January 16, 1991

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1624 — August Term 1990

(Argued: June 5,1991 Decided: July 25, 1991)

Docket No. 91-7194

CHEMUNG CANAL TRUST COMPANY, as Trustee of the FAIRWAY SPRING COMPANY, INC. RESTATED PENSION PLAN; WILLIAM H. BROWN; JOSEPH R. PETERS,

Plaintiffs.

CHEMUNG CANAL TRUST COMPANY, as Trustees of the FAIRWAY SPRING COMPANY, INC. RESTATED PENSION PLAN,

Plaintiff-Appellee,

-against-

SOVRAN BANK/MARYLAND,

Defendant-Appellant.

SOVRAN BANK/MARYLAND,

Third-Party Plaintiff-Appellant,

-against-

FAIRWAY SPRING CO., INC., THEODORE PETERSON, as President and Director of FAIRWAY SPRING CO., INC.; DONALD R. PETERSON, as Vice President and Director of FAIRWAY SPRING CO., INC.; DOROTHY TARBY, as Secretary-Treasurer and Director of FAIRWAY SPRING CO., INC.; JOHN DOE; JANE DOE, as members of the INVESTMENT COMMITTEE of the FAIRWAY SPRING CO., INC. RESTATED RETIREMENT INCOME PLAN; LYNN G.

KEYSER,

Third-Party Defendants,

FAIRWAY SPRING CO., INC.; THEODORE PETERSON, as Director of FAIRWAY SPRING CO., INC.; DONALD R. PETERSON, as Vice President and Director of FAIRWAY SPRING CO., INC.; DOROTHY TARBY, as Secretary-Treasurer and Director of FAIRWAY SPRING CO., INC. and LYNN G. KEYSER,

Third-Party Defendants-Appellees.

Before:

OAKES, *Chief Judge,*
PRATT and ALTIMARI, *Circuit Judges.*

Appeal from a judgment entered in the United States District Court for the Western District of New York, Michael A. Telesca, Chief Judge, dismissing defendant's counterclaim and third-party complaint after holding (1) that defendant, a former fiduciary, does not have standing to sue on behalf of a plan under ERISA, and (2) that there is no cause of action for contribution and indemnity under ERISA.

Affirmed on the standing issue; reversed and remanded on the contribution and indemnity issue.

Judge Altimari concurs in part and dissents in part in a separate opinion.

WILLIAM F. HANRAHAN, Washington, DC (Groom and Nordberg, Chtd., Robert P. Gallagher, Stephen M. Saxon, Lonie Hassel, of Counsel), *for Third-Party Plaintiff-Appellant.*

KENNETH A. PAYMENT, Rochester, NY (Harter, Secrest & Emery, Robert F. Pizzo, of Counsel), *for Third-Party Defendants-Appellees.*

EDWARD B. Hoffman, Elmira, NY (Sayles, Evans, Brayton, Palmer & Tifft, Donna L. Mitchell), *for Plaintiff-Appellee.*

PRATT, *Circuit Judge:*

Defendant-third-party plaintiff-appellant Sovran Bank/Maryland ("Sovran") appeals from a judgment of the United States District Court for the Western District of New York, Michael A. Telesca, Chief Judge, entered pursuant to a certification under Fed. R. Civ. P. 54(b). The judgment dismissed Sovran's counterclaim and third-party complaint based on the court's holdings that (1) as a former fiduciary, Sovran had no standing to sue on behalf of the Fairway Spring Co., Inc. Restated Retirement Income Plan ("the plan"), under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§1001-1461, ("ERISA"), and (2) Sovran had no cause of action for contribution or indemnity under ERISA. We agree with the district court that ERISA does not grant standing to former fiduciaries, and we affirm the judgment on that issue. However, we conclude that ERISA does not preclude a cause of action for contribution or indemnity. We therefore reverse the judgment of the district court on that issue and remand for further proceedings consistent with this opinion.

BACKGROUND

Fairway Spring Company, Inc. ("Fairway") established the plan in 1981 to provide retirement benefits for its employees. Under the terms of the plan, Fairway, acting through its officers, has the authority to appoint a trustee for the plan. As the plan's first

trustee, Fairway appointed Glen Dawson, who made imprudent investments and engaged in transactions prohibited under ERISA's fiduciary standards.

Effective December 1, 1984, Fairway removed Dawson as trustee, and appointed Sovran as his replacement, effective February 1,1985. During the two-month interim period, Lynn Keyser, counsel to Fairway, exercised fiduciary authority over the plan and its assets.

Some of Dawson's imprudent investments performed adequately for a time after Sovran's appointment as trustee. Eventually, however, payments owed to the plan under some of these investments ceased. In 1989, Fairway removed Sovran as trustee and appointed Chemung Canal Trust Company ("Chemung") as the new trustee.

Chemung, as the present trustee of the plan, along with two beneficiaries of the plan, brought this ERISA action against Sovran, the former fiduciary, alleging that Sovran had breached its fiduciary duties to the plan. Chemung sought to recover for the losses caused by Sovran's lack of prudence and due diligence with respect to some of the original investments made by Dawson but continued by Sovran, as well as two other questionable investments that Sovran itself had entered into on behalf of the plan.

Sovran counterclaimed against Chemung and filed a third-party complaint against Fairway, its officers, certain members of an investment committee of the plan, and Lynn Keyser, counsel to Fairway (hereinafter collectively referred to as "Fairway"). Sovran alleged that Fairway had breached its fiduciary duties by failing to monitor Dawson's activities, to correct Dawson's fiduciary breaches, and to disclose them to Sovran. It claimed that Fairway had a duty to monitor Dawson's performance, and that it knew or should have known of Dawson's fiduciary breaches, but, without acknowledging or taking action to remedy those

breaches, Fairway had merely removed Dawson as trustee. As against Chemung, Sovran's successor trustee, Sovran alleged that Chemung had failed to adequately evaluate and pursue claims of the plan and that this failure contributed to the losses which were the subject of its present suit against Sovran. Sovran requested relief directly on behalf of the plan, as well as contribution or indemnity should it be found liable to the plan.

Fairway moved to dismiss Sovran's third-party complaint, pursuant to Fed. R. Civ. P. 12(b)(6), claiming that ERISA did not allow claims for contribution or indemnity. Chemung joined in this motion. In addition to the contribution and indemnity argument, Chemung argued that Sovran lacked standing to sue on behalf of the plan, because it was no longer a fiduciary.

The district court granted these motions and dismissed the counterclaim and third-party complaint, holding (1) that Sovran had no standing and (2) that there was no cause of action for contribution or indemnity under ERISA. The district court then entered an order pursuant to Fed. R. Civ. P. 54(b), authorizing entry of a final judgment as to those claims, thereby permitting an immediate appeal. Such an appeal, wrote the court, "would promote judicial economy and reduce the expenses of both parties by eliminating the potential for duplicative litigation involving substantially similar facts". Sovran now appeals both holdings.

DISCUSSION

A. *Standing*

Sovran claims that as a former fiduciary it has a right under ERISA to sue on behalf of the plan to recover for the plan's losses. We disagree. Section 502 of ERISA, 29 U.S.C. § 1132(a), specifies those who may bring actions under ERISA and the types of actions each may pursue. The statute names only three classes of persons who may commence an action, and a former

fiduciary is not one of them. Those who can sue are: (1) a participant or beneficiary, (2) the Secretary of Labor, and (3) a fiduciary. 29 U.S.C. § 1132(a).

We have previously determined that, in the absence of some indication of legislative intent to grant additional parties standing to sue, the list in § 502 should be viewed as exclusive. *Pressroom Unions-Printers League Income Security Fund v. Continental Assurance Co.*, 700 F.2d 889, 892 (2d Cir. 1983), *cert. denied*, 464 U.S. 845 (1983) (rejecting standing of plan itself); *see also Tuvia Convalescent Center, Inc. v. National Union of Hospital & Health Care Employees*, 717 F.2d 726, 730 (2d Cir. 1983) (rejecting standing of employer). There is no indication of any legislative intent to grant a former fiduciary a continuing right to sue on behalf of the plan; consequently, *Pressman* controls, and Sovran's claim falls for lack of standing.

The eighth circuit, in *Blackmar v. Lichtenstein*, 603 F.2d 1306 (8th Cir. 1979), considered the same issue under a fact pattern that was even stronger for Sovran's position. Nevertheless, that court held that a former fiduciary does not have standing to sue on behalf of the plan, even when he was removed for the very purpose of preventing his bringing suit. There, the trustee, Blackmar, filed suit against former trustees and informed the employer that he planned to join the employer as a party defendant. To prevent this, the employer promptly removed Blackmar as trustee and appointed a successor. Blackmar challenged his removal and the appointment of new trustees, thus raising the issue of whether a former fiduciary had standing to challenge such an appointment. The eighth circuit held that once the former trustee had been removed, he ceased to be a fiduciary and could no longer sue for violations of fiduciary duty: "Adequate protection is afforded the beneficiaries under Section 502. * * * In short, Blackmar no longer has an interest in this suit." *Id.* at 1310.

Sovran claims that *Blackmar* is distinguishable because Sovran is not challenging the validity of Chemung's appointment, as was the case in Blackmar, but instead seeks merely to advance claims on behalf of the plan. We reject the proffered distinction. The crux of the eighth circuit's holding was that a former fiduciary no longer has an interest in protecting a plan to which it is now a complete stranger. Like *Blackmar,* Sovran is no longer a fiduciary of the plan and cannot be deemed one for purposes of asserting a claim under ERISA. Thus, we affirm the district court's rejection of standing for former fiduciaries under ERISA.

B. *Contribution or Indemnity*

We next address the issue of whether ERISA permits a claim for contribution or indemnity. The district court rejected such a cause of action, relying primarily on the methodology of *Cort v. Ash*, 422 U.S. 66 (1975), for determining whether a private right of action should be implied from a statute. Sovran argues that the district court erred by using an inappropriate test to dismiss its contribution claims. It contends not that contribution should be recognized as an implied right of action, but that congress intended to embody fundamental trust law principles, including contribution, into the federal law governing employee benefit plans, and directed the courts to develop a substantive federal common law of ERISA, by drawing upon those principles. Sovran recognizes that ERISA does not explicitly provide for contribution and indemnity, but argues that because a fiduciary's right to seek contribution and indemnity is a fundamental principle of equity jurisprudence governing the law of trusts, these remedies should be incorporated into the federal common law of ERISA.

The Supreme Court has indicated in other contexts that a right to contribution may be recognized "through the affirmative creation of a right of action by Congress, either expressly or by clear

implication", or "through the power of federal courts to fashion a federal common law of contribution". *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638 (1981). In ERISA, congress never dealt with contribution expressly, so the question is whether such a right can be recognized either by implication from the statute, or as a part of federal common law.

Initially, we agree with Sovran that the *Cort v. Ash* methodology is an inappropriate tool for analyzing this case. In *Cort v. Ash*, the Supreme Court devised a four-part test to determine whether a right of action should be implied from a federal statute. If applied here, the *Cort v. Ash* test would cause an automatic dismissal of Sovran's claims, because the first part of the test asks whether the party seeking the remedy [Sovran] is a member of the class for whose benefit the legislation was intended [plan participants and beneficiaries], and clearly, ERISA was enacted to protect plan participants and beneficiaries, not former fiduciaries such as Sovran. 29 U.S.C. §1001. Such an analysis is too simplistic, however, for the problem before us.

Here, we are not dealing with the usual "right of action", and it would be misleading to so characterize a defendant's right of contribution. A plaintiff who brings an action does not care whether the defendant has a right of contribution against others, as long as the plaintiff recovers the amount to which he is entitled. Contribution deals with allocating obligations among co-defendants and/or third parties. The "right of action" for contribution is no more than a procedural device for equitably distributing responsibility for plaintiff's losses proportionally among those responsible for the losses, and without regard to which particular persons plaintiff chose to sue in the first instance. The four tests of *Cort v. Ash* are not well-designed to ferret out congressional intent at this level of dispute resolution.

The next question, whether federal courts have power to fashion a federal common law under ERISA, need not detain us very

long. The Supreme Court has left no doubt that "courts are to develop a 'federal common law of rights and obligations under ERISA-regulated plans.' " *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989) (*quoting Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)). It has stated: "ERISA abounds with the language and terminology of trust law. * * * ERISA's legislative history confirms that the Act's fiduciary responsibility provisions, 29 U.S.C. §§1101-1114, 'codify and make applicable to ERISA fiduciaries certain principles developed in the evolution of the law of trusts.' " *Firestone*, 489 U.S. at 110 (citations omitted). *See also Donovan v. Bierwirth*, 754 F.2d 1049,1055 (2d Cir. 1985) ("We thus look to principles developed under the common law of trusts, which in large measure remain applicable under ERISA."); *Eaves v. Penn*, 587 F.2d 453, 462-63 (10th Cir. 1978) ("In developing a law of remedies, the Congress intended the federal courts to draw on principles of traditional trust law."). We thus hold that the federal courts have been authorized to develop a federal common law under ERISA, and in doing so, are to be guided by the principles of traditional trust law.

We must next determine whether traditional trust law provides for a right of contribution among defaulting fiduciaries. Indisputably, it does. Chemung and Fairway do not seriously contend to the contrary, nor could they, because the right of contribution among co-trustees has been for over a century, and remains, an integral and universally-recognized part of trust doctrine. *See* Restatement (Second) of Trusts § 258 (1959); Bogert, *The Law of Trusts and Trustees*, § 701 (2d ed. rev. 1982) (citing *Perry v. Knott*, 4 Beav. 179 (1842); *Sherman v. Parish*, 53 N.Y. 483 (1873)).

We thus conclude that the traditional trust law right to contribution must also be recognized as a part of ERISA. By so concluding, we are not creating a right from whole cloth. We are simply following the legislative directive to fashion, where congress has not spoken, a federal common law for ERISA by incorporat-

ing what has long been embedded in traditional trust law and equity jurisprudence. Such a rule would have no financial impact on the recovery of plaintiffs, the intended beneficiaries of ERISA. They would continue to recover their full loss from any or all breaching fiduciaries, each of whom would be jointly and severally liable to the plaintiffs.

We see no reason to reject contribution as an equitable means of apportioning wrongdoing in this context. Although it is arguable that injecting contribution claims into an already complex area of litigation will only further complicate matters and build costs, we think that even a breaching fiduciary should be entitled to the protection of contribution that has been traditionally granted fiduciary defendants under the equitable provisions of trust law. There is no reason why a single fiduciary who is only partially responsible for a loss should bear its full brunt. Full responsibility should not depend on the fortuity of which fiduciary a plaintiff elects to sue.

In arguing that a cause of action for contribution should not be recognized under ERISA, Fairway and Chemung rely heavily on *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630 (1981), and *Northwest Airlines, Inc. v. Transport Workers Union of America*, AFL-CIO, 451 U.S. 77 (1981). In *Texas Industries*, the Supreme Court rejected a defendant's right to seek contribution from a co-conspirator in a treble damages claim under the antitrust laws. It first rejected contribution under the implied right of action analysis, and then rejected it as part of a court's power to create federal common law under a particular statutory scheme. The Court looked to the legislative histories of the Sherman Act and the Clayton Act and determined that congress did not intend to confer common law rule-making power on the courts in the context of those treble damage remedies. *Id.* at 644-45. It concluded that neither act conferred power on the court to formulate a right to contribution. *Id.* at 646.

Similarly, in *Northwest*, the Supreme Court declined to recognize a right to contribution under the Equal Pay Act or Title VII of the Civil Rights Act. It rejected such a right under the implied right of action analysis as well as under a power to create federal common law, because the Court found that congress had not authorized common law rule-making power under either Title VII or the Equal Pay Act. *Id.* at 97. Thus, in both *Texas Industries* and *Northwest*, the Supreme Court rejected invitations to include a right of contribution as part of the federal common law surrounding the relevant statutes, because it concluded that congress had not authorized courts to do so in connection with those particular statutes.

Texas Industries and *Northwest* are distinguishable, however. Although it rejected the authority of the federal courts to develop a federal common law under the antitrust laws, Title VII, and the Equal Pay Act, the Supreme Court drew a sharp contrast with other areas of the law, such as admiralty and labor relations, where our power to fashion rules of federal common law is well established. Just as with the Labor Management Relations Act, under ERISA, both the legislative history and the statute itself clearly contemplate development of a federal common law. Thus, *Texas Industries* and *Northwest* are not impediments to our holding that, under ERISA, a federal common law, including the traditional trust concept of a right to contribution, is appropriate.

Fairway and Chemung also argue that the instances where the Supreme Court has recognized the need to formulate federal common law are limited to situations in which (1) a federal rule of decision is necessary to protect unique federal interests, or (2) congress has specifically given the courts the power to develop substantive law. *Texas Industries*, 451 U.S. at 640. Clearly, no unique federal interest is involved in this case, *see id.* at 642, and Fairway and Chemung contend that congress's intent to augment ERISA with certain common law principles should not be viewed

as an assignment to the courts to create distinct and substantive rights for persons the statute was not meant to benefit.

In other words, Fairway and Chemung, relying on *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134,146 (1984), argue that the authority to develop common law does not include the power to create new substantive rights. They claim that because congress could easily have expressly included a right to contribution among the remedies allowed under ERISA, but intentionally chose not to do so, we should not recognize such a right.

In *Russell*, the Supreme Court dismissed a plan beneficiary's action to recover extracontractual, compensatory and punitive damages, which were not expressly authorized under ERISA. It found, first, that the legislative history did not indicate that congress intended the particular relief sought. Second, it turned to the statute and found a comprehensive legislative scheme which indicated that the omission of such a remedy was intentional:

> The six carefully integrated civil enforcement provisions found in [29 U.S.C. § 1132(a)] of the statute as finally enacted, * * * provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly. The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a 'comprehensive and reticulated stature.'

Russell, 473 U.S. at 146 (citation omitted).

As Sovran points out, however, the decision in *Russell* did not discuss the availability of federal common law remedies, either for participants, who are granted a variety of express personal remedies by the statute, or more pertinently, for others who, like

fiduciaries, are granted no express personal remedies by the statute. The concurring opinion in *Russell* further illuminates this point:

> [I]n resolving this and other questions concerning appropriate relief under ERISA, courts should begin by ascertaining the extent to which trust and pension law as developed by state and federal courts provide for recovery by the beneficiary above and beyond the benefits that have been withheld; this is the logical first step, given that Congress intended to incorporate trust law into ERISA's equitable remedies. If a requested form of additional relief is available under state trust law, courts should next consider whether allowance of such relief would significantly conflict with some other aspect of the ERISA scheme. In addition, courts must always bear in mind the ultimate consideration whether allowance or disallowance of particular relief would best effectuate the underlying purposes of ERISA-enforcement of strict fiduciary standards of care in the administration of all aspects of pension plans and promotion of the best interests of participants and beneficiaries.

Russell, 473 U.S. at 157-58 (Brennan, J., concurring).

Congress's failure to include enforcement provisions to address the relationships among fiduciaries does not necessarily mean that congress intended to preclude such remedies. ERISA was designed specifically to provide redress for plaintiffs — the plan's participants and beneficiaries. *See* 29 U.S.C. § 1001. Its remedies do not purport to deal with allocating joint liabilities among fiduciaries, which is the essence of the problem facing us. Although this silence on the contribution issue might be argued to mean that ERISA allows only those claims that directly benefit the plan or a participant, and intentionally bars relief in all other situations, there is nothing but silence to support this conclusion.

A more likely inference is that when it came to remedies under ERISA, congress simply did not focus its attention beyond the

welfare of the plan's participants and beneficiaries. It does not follow, however, that congress would have rejected contribution claims had the issue been expressly considered. On the contrary, congress wanted courts to fill any gaps in the statute by looking to traditional trust law principles. We conclude that incorporating traditional trust law's doctrine of contribution and indemnity into the law of ERISA is appropriate.

CONCLUSION

We affirm the district court's holding that a former fiduciary does not have standing to sue on behalf of the plan. We reverse the district court's holding that there can be no cause of action for contribution or indemnity under ERISA, and remand the case for further proceedings.

ALTIMARI, *Circuit Judge*, Concurring in part and Dissenting in part:

Although I am in great sympathy with the majority's holding and am impressed with its reasoning, I must dissent from that portion of the majority's decision which finds that ERISA provides fiduciaries with causes of action for indemnification and contribution. While the majority's decision makes good sense, such good sense does not always find its way into legislation enacted by Congress, as the statute at issue demonstrates. Therefore, I write separately.

I do not believe that in this instance we can, in effect, legislate that Congress intended to leave open to courts the right to fashion common law remedies of indemnification and contribution under ERISA. Though Congress has endowed courts with the power to formulate federal common law in ERISA cases, it has not given the federal judiciary the power to "engraft a remedy on a statute, no matter how salutary, that Congress did not intend to

provide." *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 137, 145 (1985) (quoting *California v. Sierra Club, 451 U.S. 287, 297 (1981)).*

It seems clear that Congress was aware that the issue of fiduciary indemnification and contribution was bound to arise under ERISA. Indeed, a section of the statute delineates the circumstances in which a co-fiduciary may be liable for another fiduciary's breach of fiduciary responsibility. *See* 29 U.S.C. § 1105 (1988). Moreover, it is equally apparent that Congress was conscious that the general principles of trust law, upon which ERISA is based, *see Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989), would allow a breaching fiduciary to obtain indemnification and contribution from other wrongdoers. *See* Restatement (second) of Trusts § 258 (1959). Despite its obvious awareness of both the problem at hand and its potential solution, Congress, in crafting ERISA's "interlocking, interrelated and interdependent remedial scheme," *see Russell*, 473 U.S. at 146, failed to provide remedies in favor of breaching fiduciaries. Essentially, Congress' omission of all references to the allocation of costs among fiduciaries for joint liabilities demonstrates its rejection of the scheme of contribution and indemnification adopted by the majority. Simply stated, if Congress had intended to include a right of action for contribution and indemnification it would have done so.

For the reasons set forth above, I would affirm the judgment of the district court in all respects.

No. 88-15076

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STERLING CALL, ET AL.,

Plaintiffs-Appellants

v.

SUMITOMO BANK OF CALIFORNIA, ET AL.,

Defendants-Appellees

On Appeal From The United States District
Court For The Northern District of California

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE

GEORGE R. SALEM
Solicitor of Labor

MARC I. MACHIZ
Associate Solicitor

SHERWIN S. KAPLAN
Counsel for Fiduciary Litigation

KAREN L. HANDORF
Attorney
U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division

P.O. Box 1914
Washington, D.C. 20013
(202) 523-6844

TABLE OF CONTENTS

PAGE

Interest of the Secretary of Labor 1

Statement of the Issue 2

Statement of the Case:

A. Jurisdiction and Appealability 2

1. Jurisdiction of the district Court 2
2. Jurisdiction of the Court of Appeals 2
3. Appealability of the Order 2
4. Timeliness of Appeal 3

A. Procedural history 3

B. Statement of facts 4

Argument:

ERISA ALLOWS A FIDUCIARY WHO HAS REIMBURSED A PLAN FOR LOSSES INCURRED AS A RESULT OF A FIDUCIARY BREACH TO MAINTAIN AN ACTION AGAINST A CO-FIDUCIARY WHO IS JOINTLY AND SEVERALLY LIABLE FOR THE BREACH.

A. Congress intended for the courts to create a federal common law in determining what "other appropriate equitable relief" is available to remedy fiduciary violations of ERISA 5

B. Recognition of a right of contribution is consistent with the Congressional directive to look to the common law of trusts in fashioning equitable remedies under ERISA 9

Conclusion 17

TABLE OF AUTHORITIES

Cases: **Page**

Alton Memorial Hosital v. Metropolitan Life Insurance Co.
656 F.2d 245 (7th Cir. 1981) 11

Brock v. Hendershott
840 F.2d 339 (6th Cir. 1988) 9

Brock v. Self
632 F.Supp. 1509 (W.D. La. 1986).....11

Central States Pension Fund v. Central Transport. Inc.
472 U.S. 559 (1985).....8,15

Cort v. Ash
422 U.S. 66 (1975) 16

Crawford v. LaBoucherie Bernard, Ltd.
815 F.2d 117 (D.C. Cir. 1987).....8

Donovan v. Bierwirth
680 F.2d 263 (2d Cir. 1982) 7

Donovan v. Mazzola
716 F.2d 1226 (9th Cir. 1983), *cert. denied* 464 U.S.
1040 (1984) 8

Eaves v. Penn
587 F.2d 453 (10th Cir. 1978) 6,7,8

Franchise Tax Board of California v. Laborers Vacation Trust
463 U.S. 1 (1983) 7

Franklin v. Aetna Life Insurance Co.
10 E.B.C. 1022 (D.S.C. 1988) 11

Free v. Briody
732 F.2d 1331 (7th Cir. 1984) 11,13

Freund v. Marshall & Ilsley Bank
485 F.Supp 629 (W.D. Wis. 1979) 10,11

Gilliam v. Edwards
492 F.Supp. 1225 (D.N.J. 1978) 10

Katsaros v. Cody
744 F.2d 270 (2d Cir. 1980) 10

Leigh v. Engle
727 F.2d 113 (7th Cir. 1984) 7

Lowen v. Tower Management, Inc.
829 F.2d 1209 (2d Cir. 1987) 9

Marshall v. Snyder
572 F.2d 894 (2d Cir. 1978) 8

Massachusetts Mutual Life Insurance Co. v. Russell
473 U.S. 134 (1984) 8,9,13,15

Menhorn v. Firestone Tire and Rubber Co.
758 F.2d 1496 (9th Cir. 1984) 7

Nachman Corp. v. Pension Benefit Guaranty Corp.
446 U.S. 359 (1980) 6,7

Nieto v. Ecker
845 F.2d 868 (9th Cir. 1988) 8

Northwest Airlines, Inc. v. Transport Workers
451 U.S. 77 (1981) 5,16

Pilot Life Insurance Co. v. Dedeaux
109 S.Ct. 1549 (1988) 15

Sokol v. Bernstein
803 F.2d 532 (9th Cir. 1986) 15

Texas Industries, Inc. v. Radcliff Materials, Inc.
451 U.S. 630 (1981) 5

Textile Workers v. Lincoln Mills
353 U.S. 448 (1957) 6

Thorton v. Evans
692 F.2d 1064 (7th Cir. 1982) 9

Wheeldin v. Wheeler
373 U.S. 647 (1963) 5

Whitfield v. Lindemann
853 F.2d 1298 (5th Cir. 1988) 11

Statutes and regulations:

28 U.S.C. §1291 2

Civil Rights Act of 1964 16

Equal Pay Act of 1963 16

Employee Retirement Income Security Act of 1974

29 U.S.C. 1001 *et seq.*

Section 409, 29 U.S.C. §1109 3,8,13

Section 502, 29 U.S.C. §1132 2,3,8

Section 502(a)(1), 29 U.S.C. §1132(a)(1) 13,14

Section 502(a)(2), 29 U.S.C. §1132(a)(2) 7,8

Section 502(a)(3), 29 U.S.C. §1132(a)(3) 7,8,14,15

Section 502(a)(5), 29 U.S.C. §1132(a)(5) 7,8

Section 502(e), 29 U.S.C. §1132(e) 2

Section 503, 29 U.S.C. §1133 14

Labor Management Relations Act

Section 301(a), 29 U.S.C. §185(a) 5,6

Miscellaneous:

120 Cong. Rec. 29933 (1974) 7

120 Cong. Rec. 29942 (1974) 7

Restatement (Second) of Trusts §258 (1959) 10

3 A. Scott, *Law of Trusts* §258 (1988) 10

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-15076

STERLING CALL, ET AL.,

Plaintiffs-Appellants

v.

SUMITOMO BANK OF CALIFORNIA, ET AL.,

Defendants-Appellees

On Appeal From The United States District
Court For The Northern District Of California

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE

INTEREST OF THE SECRETARY OF LABOR

This case involves the scope of the remedies available for correcting violations of the fiduciary provisions of Title I of the Employee Retirement Income Security Act of 1974 ("ERISA or the Act"), 29 U.S.C. § 1001 *et seq.* The Secretary of Labor ("the Secretary") has primary enforcement authority for correcting such violations and, therefore, has a substantial interest in ensuring that the remedies available under ERISA are not restricted.

The district court concluded that ERISA's comprehensive civil enforcement scheme reflects a Congressional intent that only those remedies explicitly enumerated in ERISA are available under the statute. Because the reasoning of the court could be applied to restrict the use of remedies developed by the federal

courts under the common law of trusts, the Secretary has a substantial interest in having the district court's decision reversed.

STATEMENT OF THE ISSUE

Whether a fiduciary who has reimbursed a plan for losses incurred as a result of a fiduciary breach may maintain an action for contribution under Section 502 of ERISA, 29 U.S.C. §1132, against a co-fiduciary who is jointly and severally liable for the breach.[1]

STATEMENT OF THE CASE

A. *Jurisdiction and Appealability*

1. Jurisdiction of the district court

The district court's jurisdiction arises from ERISA §502(e), 29 U.S.C. §1132(e).

2. Jurisdiction of the Court of Appeals

The court has jurisdiction over this appeal pursuant to 28 U.S.C. §1291.

3. Appealability of the order

This order of the district court dismissing the complaint is a final order pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

4. Timeliness of Appeal

The order appealed from was entered by the district court on June 28, 1988. Appellants filed a timely notice of appeal on July 28, 1988.

---

[1] The Secretary takes no position on the other issues raised in this appeal.

B. *Procedural History*

This action was brought by members of the Administrative Committees of the Phase II Corporation Restated Profit Sharing Plan and the California Etching Corporation Restated Profit Sharing Plan ("the Plans") under Sections 409 and 502 of ERISA, 29 U.S.C. §§1109 and 1132, against Khateeb Lateef and Lateef Management Associates, the investment advisors to the Plans, Sumitomo Bank of California, the trustee of the Plans, and Ray W. Sherman, an escrow agent of the Plans, in connection with a real estate investment of the Plans. The complaint sought, *inter alia*, contribution from the defendants for amounts deposited into the Plans by the plaintiffs in settlement of claims made by the Secretary concerning breaches of fiduciary duty with respect to the real estate investment. The complaint alleged that the defendants also breached their fiduciary duties in connection with the real estate investment, and, therefore, are equally liable for the losses to the Plans.

The defendants moved to dismiss the complaint for failure to state a claim upon which relief could be granted. On June 28, 1988, the district court dismissed the complaint, holding, *inter alia*, that ERISA, on its face, does not authorize a fiduciary to bring suit against his co-fiduciaries for contribution, and that the statutory language, structure, and legislative history of ERISA indicate that Congress did not intend to authorize remedies other than those explicitly provided for in the statute.

C. *Statement of facts*

In December 1980, the Administrative Committees of the Plans decided to invest in a residential real estate development project. The Plans initially invested $100,000 each in the project, and later invested an additional $30,000 each. The Administrative Committees made these investment decisions on the advice

of Khateeb Lateef and Lateef Management Associates, the investment advisors to the Plans. As part of the real estate transaction, Sumitomo Bank, the trustee for the Plans, and Roy Sherman, the escrow holder, executed escrow instructions. These instructions provided that Sherman would deliver to Sumitomo Bank a recorded deed of trust securing promissory notes that the Plans had received in return for their investment. However, neither Sherman nor Sumitomo Bank recorded the trust deed.

On June 4, 1984, the real estate project in which the Plans had invested filed for bankruptcy. Because the Plans were unsecured as a result of the failure to record the trust deed, the investment by the Plans was a total loss.

The Department of Labor investigated the Plans' investment in the real estate project, and determined that the Plans' fiduciaries had violated ERISA in their participation and handling of the real estate investment. The Department sought restitution of the funds lost as a result of the investment from members of the Plans' administrative committees. Those individuals settled the claims made by the Department through a combination of deposits to the Plans and forfeitures of their own individual accounts in each Plan. The forfeitures and deposits equaled the lost principal and earnings. The members of the administrative committees then brought this action seeking contribution from Lateef, Lateef Management Associates, Sumitomo Bank, and Sherman.

ARGUMENT

ERISA ALLOWS A FIDUCIARY WHO HAS REIMBURSED A PLAN FOR LOSSES INCURRED AS A RESULT OF A FIDUCIARY BREACH TO MAINTAIN AN ACTION AGAINST A CO-FIDUCIARY WHO IS JOINTLY AND SEVERALLY LIABLE FOR THE BREACH.

A. *Congress intended for the courts to create a federal common law in determining what "other appropriate equitable relief" is available to remedy fiduciary violations of ERISA.*

It is well established that a federal remedy such as contribution may be created through the power of the federal courts to fashion appropriate remedies for unlawful conduct as part of the federal common law. *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 90 (1981); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 638 (1981). While the power of the courts to create federal common law is limited, it does exist in those instances when Congress has given the courts the power to develop substantive law. *Wheeldin v. Wheeler*, 373 U.S. 647, 652 (1963); *Texas Industries*, 451 U.S. at 640. For example, the Supreme Court has read section 301(a) of the Labor Management Relations Act, 29 U.S.C. §185(a), as not only granting the federal courts jurisdiction over certain areas of labor law but also as vesting in the courts the power to develop a common law of labor-management relations by "looking at the policy of the legislation and fashioning a remedy that will effectuate that policy." *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1957).

The intent of Congress to have the courts develop a federal common law with respect to the fiduciary provisions of ERISA, similar to the power granted to the courts to develop a federal common law of labor-management relations, is clear from the legislative history of ERISA. ERISA represents the culmination of almost ten years of effort by Congress to develop uniform, nationally applicable standards for the administration of private sector employee pension and welfare benefit plans. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). A primary purpose of Congress was to federalize and apply the protections of trust law to employee benefit plans and to have the federal courts draw on principles of traditional trust law to fashion appropriate remedies. *Eaves v. Penn*, 587 F.2d 453,

462 (10th Cir. 1978). This intent to make the common law of trusts applicable to employee benefit plans by development of federal substantive law is clear from the statement of Senator Williams, one of two principal Senate sponsors of ERISA, who emphasized that suits involving beneficiaries' rights "will be regarded as arising under the laws of the United States, in similar fashion to those brought under section 301 of the Labor Management Relations Act." 120 Cong. Rec. 29933 (1974) (remarks of Sen. Williams). Similarly, Senator Javits, the other principal Senate sponsor of ERISA, stated, "[I]t is ... intended that a body of federal substantive law will be developed by the courts to deal with the issues involving rights and obligations under private welfare and pension plans." 120 Cong. Rec. 29942 (1974) (remarks of Sen. Javits). *See Franchise Tax Board of California v. Laborers Vacation Trust*, 463 U.S. 1, 24, n.26 (1983).

Consequently, while ERISA, in its entirety, is a "comprehensive and reticulated statute", Nachman, 446 U.S. at 361, the fiduciary responsibility standards contained in Part 4 of Title I set forth only a broad outline of a fiduciary's duty to a plan, and are not meant to restrict the full scope of the those standards and their application in concrete situations. *Menhorn v. Firestone Tire and Rubber Co.*, 758 F.2d 1496, 1499 (9th Cir. 1984). Instead, "[t]he courts are directed to formulate a nationally uniform federal common law to supplement the explicit provisions and general policies set out in ERISA, referring to and guided by principles of state law when appropriate, but governed by the federal policies at issue." *Menhorn*, 738 F.2d at 1500. *See also Leigh v. Engle*, 727 F.2d 113, 122 (7th Cir. 1984); *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982), *cert. denied*, 459 U.S. 1069; *Eaves v. Penn*, 587 F.2d 453, 457 (10th Cir. 1978).

Similarly, the civil enforcement provisions contained in ERISA §§502(a)(2), (3), and (5), 29 U.S.C. §1132(a)(2), (3), and (5), set forth the broad spectrum of remedies available to redress

violations of the fiduciary responsibility provisions of ERISA, but by the language of the provisions themselves, are not limited to explicitly defined remedies. For example, ERISA §502(a)(2) authorizes the Secretary, a participant, beneficiary or a fiduciary to bring a civil action for "appropriate relief" under Section 409 of ERISA, 29 U.S.C §1109. ERISA §502(a)(3)(B) authorizes a participant, beneficiary, or fiduciary "to obtain other appropriate equitable relief" to redress violations of Title I or to enforce provisions of Title I or the terms of the plan. Finally, ERISA §502(a)(5) grants the Secretary the power, *inter alia*, "to obtain other equitable relief."

Justice Brennan, in his concurring opinion in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, (1984), noted, "The legislative history demonstrates that Congress intended federal courts to develop common law in fashioning the additional 'appropriate equitable relief'." 473 U.S. at 156. If the requested form of relief is available under state trust law, "courts should next consider whether allowance of such relief would significantly conflict with some other aspect of the ERISA scheme", 473 U.S. at 157-8. *See also Eaves, supra.* Consistent with this mandate, courts have made numerous remedies available under section 502 of ERISA that are not specifically set forth in the statute, but which are borrowed from state trust law. *See, e.g., Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559 (1985) (trustees of plans have the authority to audit employer records); *Donovan v. Mazzola*, 716 F.2d 1226, 1235 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984) (upholding order requiring appellants to post $1 million bond); *Crawford v. LaBoucherie Bernard, Ltd.*, 815 F.2d 117 (D.C. Cir. 1987) (upholding order offsetting profit sharing plan fiduciaries' interests in plan); *Marshall v. Snyder*, 572 F.2d 894, 901 (2d Cir. 1978) (upholding right to appointment of a receiver). *But cf., Nieto v.*

Ecker, 845 F.2d 868 (9th Cir. 1988) (holding that a non-fiduciary may not be sued as a knowing participant in a fiduciary breach).[2]

B. *Recognition of a right of contribution is consistent with the Congressional directive to look to the common law of trusts in fashioning equitable remedies under ERISA.*

An application of the standards set forth by Justice Brennan in his concurring opinion in *Russell* establishes that a right of contribution should be made available under ERISA. Recognition of the right of contribution is consistent with the Congressional directive to look to the common law of trusts in fashioning equitable remedies under ERISA, since it is well established under general trust principles that a fiduciary who makes good a loss resulting from a fiduciary breach is entitled to contribution from other fiduciaries with whom he is jointly and severally liable. *See* A. Scott, Law of Trusts §258 (4th ed. 1988); Restatement (Second) of Trusts §258 (1959). Moreover, the remedy of contribution does not conflict with any other aspect of the ERISA scheme, and, as in this case, may actually promote the best interest of participants and beneficiaries.

---

[2] In *Nieto* a panel of this court held that ERISA does not authorize suit against a non-fiduciary as a knowing participant in a fiduciary breach, relying upon *Russell* for the proposition that Congress did not intend to authorize remedies that were not expressly included in ERISA. We believe that the *Nieto* panel, like the district court here, incorrectly expanded *Russell's* holding beyond the benefit claims area, and disregarded the substantial legislative history establishing that Congress intended to incorporate the common law of trusts to remedy breaches of fiduciary duty. Moreover, the panel's decision in *Nieto* is in conflict with the Supreme Court's decision in *Central States, supra*, with a decision of another panel of this Court in *Mazzola, supra*, and with a long line of authority reaching a contrary result on the issue of knowing participation. *See, e.g., Brock v. Hendershott*, 840 F.2d 339, 342 (6th Cir. 1988); *Lowen v. Tower Asset Management, Inc.*, 829 F.2d 1209, 1220-21 (2d Cir. 1987); *Thorton v. Evans*, 692 F.2d 1064, 1078 (7th Cir. 1982).

A primary focus of ERISA'S enforcement scheme is to put the plan in the position it would have occupied but for the breach of fiduciary duty, i.e. to make employee benefit plans whole in situations where assets or income have been lost as a result of fiduciary breaches. *See Freund v. Marshall & Ilsley Bank*, 485 F.Supp 629, 643 (W.D. Wis. 1979); *Gilliam v. Edwards*, 492 F.Supp. 1225, 1266-67 (D.N.J. 1978); *Katsaros v. Cody*, 744 F.2d 270, 281 (2d Cir. 1980). A right of contribution encourage a fiduciary to voluntarily restore losses to the plan caused by his and another's fiduciary breaches, since he then has the right to seek contribution from his co-fiduciaries who may be equally culpable. Consequently, a right of contribution increases the likelihood that the Secretary will be able to obtain restitution without a full trial of the merits. Indeed, it is unlikely that the plaintiffs here would have agreed to completely compensate the Plans for losses had they realized that they would be unable to obtain contribution from other fiduciaries who may be equally culpable. Because a right of contribution encourages fiduciaries to remedy breaches by voluntarily restoring losses to a plan, such a right furthers the intent of Congress to protect the financial integrity of employee benefit plans, and should be included among the remedies available under ERISA.

Because the rights of contribution and indemnification are available under the common law of trusts, courts have recognized the rights of contribution and indemnification as equitable remedies available under the civil enforcement provisions of ERISA. *Free v. Briody*, 732 F.2d 1331 (7th Cir. 1984); *Alton Memorial Hosp. v. Metropolitan Life Insurance Co.*, 656 F.2d 245 (7th Cir. 1981); *Freund v. Marshall & Ilsley Bank*, 485 F.Supp. 629 (W.D. Wis. 1979); *Whitfield v. Lindemann*, 853 F.2d 1298,

1303 (5th Cir. 1988); *Brock v. Self*, 632 F.2d 1509 (W.D. La. 1986).[1]

The district court distinguishes this case from the Seventh Circuit's decision in *Free v. Briody, supra*, placing great significance on the fact that *Free* involved a passive trustee seeking indemnity from an active co-trustee for his misconduct, and that the Seventh Circuit's award of indemnification was confined to "the limited circumstances" of the case. The district court concluded that, because the plaintiffs here were not passive wrongdoers, the trust principles invoked in *Free* would not apply. The district court's suggestion that the *Free* decision was limited to the narrow circumstances of the case, however, misses the point. The *Free* court held that ERISA authorizes the right of indemnification, and that an award of indemnification under the circumstances of the case was justified. Clearly, the circumstances of each case determine whether contribution may be justified, but to state that there is no right to contribution because an award may be justified only in narrow circumstances would, in colloquial terms, "put the cart before the horse".

The district court also rejects the reasoning of *Free* because its statement that plan fiduciaries are among the class for whose especial benefit ERISA was enacted "flies in the face" of the statute's stated purpose to protect the interests of participants and beneficiaries. As explained above, however, a right of contribu-

---

[1] In *Franklin v. Aetna Life Insurance Co.*, 10 E.B.C. 1022 (D.S.C. 1988) and *McClendon v. Continental Group, Inc.*, 7 E.B.C. 2403 (D.N.J. 1986), the courts found no right of contribution in ERISA. The *McClendon* court did not consider whether a right of contribution could arise under federal common law, since the parties neither briefed nor argued the proposition. The *Franklin* court concluded that this was not a situation where Congress has empowered the courts to develop substantive law, erroneously citing *McClendon* for that proposition. We believe that both courts were incorrect in finding no right of contribution under ERISA for the same reasons that the district Court here was incorrect.

tion would result in protection of the interests of participants and beneficiaries, since it would encourage a fiduciary to restore losses to the plan on the assumption that he will be able to recapture a portion of those losses from his co-fiduciaries.

Finally, the district court misreads *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1984) when it states that *Free* cannot be reconciled with *Russell*. The question in *Russell* was whether ERISA authorizes recovery of extra-contractual compensatory and punitive damages caused by improper and untimely processing of benefit claims. The Supreme Court found no intent on the part of Congress to include such damages under the "other equitable relief" provisions of section 409 of ERISA, 29 U.S.C. §1109. Significantly, an award of compensatory or punitive damages is generally considered to be a legal rather than an equitable remedy, and is not generally available under the common law of trusts. Since Congress authorized other "equitable relief" in Section 409 and expressed its intent that courts develop such relief based upon trust law, there was no discernable intent on the part of Congress to include extra-contractual punitive and compensatory damages among the remedies available under ERISA.

Moreover, the district court reads *Russell* too broadly when it states that *Russell* stands for the proposition that the only remedies available to redress fiduciary breaches are those specifically enumerated in the statute. *Russell* involved issues relating to the processing of benefit claims, and the statutory provision in ERISA concerning claims for benefits are separate and more specific than those concerning general fiduciary breaches. Section 502(a)(1)(B) of ERISA, 29 U.S.C. §1132(a)(1)(B), authorizes suit by a participant to recover benefits available to him, to enforce his rights under the terms of the plan, and to clarify his rights to future benefits under the terms of the plan, but does not allow a participant to bring suit to obtain any other relief, legal or equita-

ble, with respect to claims for benefits. Additionally, section 503 of ERISA, 29 U.S.C. §1133, authorizes the Secretary to promulgate regulations requiring plans to provide adequate notice in writing to participants whose claims for benefits have been denied and to afford a reasonable opportunity for a hearing to such participants. Those sections, read together, indicate that Congress intended to limit the remedies available to participants with respect to benefit claims to those specifically set forth in ERISA and to those that the Secretary, through the regulatory process, determines are necessary. Consequently, with respect to claims for benefits, ERISA provides a comprehensive remedial scheme with no evidence of an intent on the part of Congress to have the courts fashion additional remedies.

In contrast, the remedial provisions of section 502(a)(3) of ERISA, 29 U.S.C. §1132(a)(3), relating to breaches of fiduciary duty, are much broader than those in section 502(a)(1), 29 U.S.C. § 1132(a)(1), and specifically authorize suit by a fiduciary "to obtain other appropriate equitable relief." 29 U.S.C. §1132(a)(3)(B). To restrict the remedies available under ERISA to those specifically enumerated would make section 502(a)(3)(B) meaningless, and would ignore the Congressional mandate to create federal common law with respect to the fiduciary provisions of ERISA.

As the district court noted, the Ninth Circuit extended the analysis in *Russell* to section 502(a)(3) in *Sokol v. Bernstein*, 803 F.2d 532 (9th Cir. 1986), and held that suit for extra-contractual compensatory and punitive damages is not authorized by that section either. *Sokol*, however, did not involve ERISA fiduciary provisions, but, like *Russell*, involved an award of extra-contractual compensatory and punitive damages with respect to a benefit claim. The same reasoning which compelled rejection of that award in Russell also compelled rejection of the award in *Sokol*.

To read both *Sokol* and *Russell* so broadly as to eliminate remedies for fiduciary breaches available under the common law of trusts from ERISA's remedial scheme would not only be inconsistent with the legislative history of ERISA, but also with the Supreme Court's interpretation of the statute. In *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985), the Court stated, "Rather than explicitly enumerating all of the powers and duties of trustees and other fiduciaries, Congress invoked the common law of trusts to define the general scope of their authority and responsibility." And in *Pilot Life Insurance Co. v. Dedeaux*, 109 S.Ct 1549 (1988) the Court acknowledged the Congressional intent "that a federal common law of rights and obligations under ERISA-regulated plans would develop."

Finally, the district court's comparison of *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77 (1981) to this case ignores a significant distinguishing factor. In *Northwest Airlines*, there was no intent on the part of Congress to have the federal courts develop a federal common law under either the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964. Consequently, the Supreme Court was required to determine whether Congress intended to create the specific remedy of contribution when it enacted those statutes by using the standards set forth in *Cort v. Ash*, 422 U.S. 66 (1975). However, as shown above, Congress clearly intended for equitable remedies available under the common law of trusts to be incorporated into ERISA's remedial scheme. To bar such equitable remedies because they are not specifically enumerated would "tamper with the enforcement scheme crafted with such evident care", a result that the Supreme Court cautioned against in *Russell*, 473 U.S. at 134. Instead, the courts should determine whether the remedy is available under traditional trust law, and then determine whether it "would significantly conflict with some other aspect of the ERISA scheme". *Russell*, 473 U.S. at 157. A right of contribution is

available under traditional trust law, and would not conflict with any other aspect of the civil enforcement scheme of ERISA. It should, therefore, be included among the remedies available under the statute.

CONCLUSION

For the foregoing reasons, the Secretary respectfully urges that the lower court's decision be reversed.

Respectfully submitted,

GEORGE R. SALEM
Solicitor of Labor

MARC I. MACHIZ
Associate Solicitor

SHERWIN S. KAPLAN
Counsel for Fiduciary Litigation
Plan Benefits Security Division

KAREN L. HANDORF
Attorney
U.S. Department of Labor
Office of the Solicitor
Plan Benefits Security Division
P.O. Box 1914
Washington, D.C. 20013
(202) 523-6844